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86-150

Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

LILLIAN ZOBEL, by Herbert Z. Hancox and Helen W. Hancox, her guardians,

Plaintiff-Appellee,

v.

LEE FENENDAEL and GLORIA FENENDAEL, his wife,

Defendants-Appellants.

On appeal from the Wisconsin Court of Appeals, District II, following a denial of review by the Wisconsin Supreme Court

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APPENDIX TO JURISDICTIONAL STATEMENT

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STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT II

LILLIAN ZOBEL, by Herbert Z. Hancox and Helen W. Hancox, her guardians,

Plaintiff-Appellant,

v.

DECISION of November 20, 1985 No. 84-1539

LEE FENENDAEL and GLORIA FENENDAEL, his wife,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Fond du Lac county: JOHN P. McGALLOWAY, JR., Judge.

Reversed and cause remanded.

Before Scott, C.J., Brown, P.J., and Nettesheim, J.

NETTESHEIM, J. Herbert and Helen Hancox, guardians of Lillian Zobel, appeal from a judgment entered following a jury trial dismissing their complaint which sought to void a gift by deed executed by Zobel to Lee and Gloria Fenendael. The jury determined that

Zobel was competent at the time she made the gift.

During trial, the Hancoxes sought to amend their complaint to conform to certain evidence which showed that Zobel executed the deed while she was subject to a conservatorship. The Hancoxes claimed that Zobel's gift was void, as a matter of law, since it was made without the approval of the conservator or conservatorship court. The trial court denied the motion to amend the pleadings. We conclude the denial of the motion was an abuse of discretion since no surprise or prejudice to the Fenendaels is demonstrated. We also conclude, as a matter of law, that a conservatee lacks the capacity to make a gift without the approval of the conservator or the conservatorship court. Therefore, we reverse and remand with instructions to allow amendment to

the pleadings and to enter judgment in favor of the Hancoxes.

On December 20, 1979, Lillian Zobel sold her house on a land contract to the Fenendaels. In November, 1981, Zobel petitioned the circuit court for the appointment of a conservator of her estate. The conservatorship court appointed the Hancoxes as conservators of Zobel's estate. After the appointment of the Hancoxes, Zobel decided that she wanted to forgive the balance of the land contract and gift her house to Gloria Fenendael. In March, 1982, Zobel executed a deed to the Fenendaels in satisfaction of the balance of the land contract. She did not inform the Hancoxes or the conservatorship court of the pending transaction nor seek their approval of the gift. [1]

The amended complaint upon which the jury trial was conducted alleged that

Zobel was not competent to make the gift by deed in March 1982. [2] Based upon these allegations, the Hancoxes sought foreclosure of the land contract. During the course of the Hancoxes' case-in-chief, testimony and documentary evidence established that Zobel was subject to the conservatorship at the time she executed the March 1982 deed in satisfaction of the land contract.

At the close of the Hancoxes' case, the trial court judicially noticed the conservatorship and guardianship file regarding Zobel. The Hancoxes moved for leave to amend their pleadings to include "the defense that the gift was not approved either by the conservator or the court." [3] Based upon this amendment, the Hancoxes then requested judgment as a matter of law contending that Zobel, as a conservatee, lacked the capacity to make a gift. The trial court took the motions

under advisement and stated that it would proceed to take a verdict.

At the close of the evidence, the Hancoxes again moved to amend their amended complaint to conform to the evidence and for judgment. The trial court again deferred ruling on the motions until a verdict was obtained. By decision on motions after verdict, the trial court denied the motion to amend the pleadings. The trial court's decision also, however, determined that the approval of the conservator or the conservatorship court was not required to render Zobel's gift effective. [4]

The Fenendaels rely upon sec. 802.06(2) and (4), Stats., which provides, in part:

> (2) Every defense, in law or fact, except the defense of improper venue, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim shall be asserted in the

> responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion ....
>
> (4) The defenses specifically listed in sub. (2), whether made in a pleading or by motion, . . . shall be heard and determined before trial on motion of any party, unless the judge to whom the case has been assigned orders that the hearing and determination thereof be deferred until the trial. [Emphasis added.]

This statute, however, does not apply to complaints. It is limited, on its face, to defenses asserted in a responsive pleading. Therefore, the Fenendaels' reliance on this statute and the related line of cases they cite is misplaced. [5]

Rather, the governing statute is sec. 802.09(2), Stats. The most complete discussion and analysis of this statute is contained in State v. Peterson, 104 Wis. 2d 616, 312 N.W.2d 784 (1981). Peterson bifurcates the statute into two parts governing two different fact

situations. The first addresses a situation where the issues are tried by the express or implied consent of the parties:

> AMENDMENTS TO CONFORM TO THE EVIDENCE. If issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues ....

Sec. 802.09(2). This part of the statute appears to be mandatory; if the trial court concludes that the parties consented to the trial of the issues, the court must conform the pleadings to the proof. Peterson at 629, 312 N.W.2d at 790.

The second addresses a situation where an objection is made at trial that

the evidence offered is not within the issues raised by the pleadings. Id.

> If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objection party fails to satisfy the court that the admission of such evidence would prejudice such party in maintaining the action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Sec. 802.09(2), Stats. When objection is made, the statute grants the court discretion to allow the amendment and encourages the court "to do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining the ... defense upon the merits." Peterson

at 629-30, 312 N.W.2d at 790-91.

Our reading of the entire record in this case reveals that the existence of the conservatorship was alluded to scores of times without objection. Documentary evidence establishing the existence of the conservatorship was stipulated into evidence. At various stages in the proceedings, the Fenendaels themselves put in evidence concerning the conservatorship. The record reveals, by our court, seventeen references to the conservatorship by either the Hancoxes or the Fenendaels before the Fenendaels objected on the relevancy and pleading grounds asserted on this appeal. Under these circumstances, we conclude that the Fenendaels did not timely object to the proofs submitted. Therefore, we analyze the issue on the motion to amend the pleadings as one governed by the first portion of sec. 802.09(2), Stats. This

requires us to determine whether the issues relating to the conservatorship were tried by the express or implied consent of the parties.

Here, there was no express consent. [6] Thus, if the Fenendaels consented to trial of the conservatorship issues, the consent must be implied.

Whether an issue has been tried by implied consent is to be determined by the circuit court; the circuit court must make findings on the issue of consent, because once consent is found, the circuit court has no choice but to amend the pleadings. Peterson at 631, 312 N.W.2d at 791. Here, the circuit court did not make any findings that there was -- or was not -- implied consent. We are thus faced with the issue of whether we can on the basis of the record before us determine whether, as a matter of law, the Fenendaels understood, were aware of,

or had actual notice that the issue of Zobel's legal capacity as a conservatee was being raised by the evidence concerning the conservatorship. See id.

Implied consent is generally held to exist where there is no objection to the introduction of evidence on the unpleaded issue and where the party not objecting is aware that the evidence goes to the unpleaded issue; actual notice to the parties appears to be the key factor in determining whether there was implied consent. Id. at 630, 312 N.W.2d at 791. As noted above, the evidence concerning the conservatorship was admitted without timely objection. The more difficult question is whether the Fenendaels were aware that the conservatorship evidence went to the issue of Zobel's capacity to make a gift -- an unpleaded issue. In order to find implied consent, it must appear that the

parties understood the evidence was aimed at the unpleaded issue. Id. Because the evidence on the conservatorship issues was also relevant to the issue of Zobel's competency, the Fenendaels may not have been aware that the Hancoxes were raising a new unpleaded issue. Thus, we cannot conclude, as a matter of law, that the Fenendaels had actual notice that the evidence concerning the conservatorship went to the unpleaded issue. Therefore, the Fenendaels did not impliedly consent to the trial of such issue.

Our analysis does not stop at this point, however. This is because Peterson engrafts upon sec. 802.09(2), Stats., an "interests of justice" determination even after a finding that no implied consent to the trial of the unpleaded issue existed.

> If the evidence has been introduced without objection and the circuit court finds

> that there has been no actual notice, it should find that there has been no implied consent of the unpleaded issue. Under such circumstances, the circuit court may sua sponte under sec. 802.09(1), (2) amend the pleadings to conform to the evidence if the circuit court concludes that justice so requires. Amendment is thus within the discretion of the circuit court and the circuit court in exercising its discretion must balance the interests of the party benefiting by the amendment and those of the party objecting to the amendment.

Id. at 634, 312 N.W.2d at 793 (emphasis added). This "interests of justice" consideration is, essentially, a determination of prejudice. See id. at 635, 312 N.W.2d at 793. [7]

Although the supreme court in Peterson did not expressly state that the determination of prejudice in this context presents a question of law, we conclude that it does. We do so not only because the supreme court in Peterson

proceeded to address the question, but also because prejudice, in other contexts, has been held to present a mixed question of law and fact. State v. Pitsch, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711, 714-15 (1985).

Here, the historical facts relating to the question of prejudice are undisputed. Thus, we are left with only the legal question as to whether prejudice exists. This court is not bound by a trial court finding based on undisputed evidentiary facts when the finding is essentially a conclusion of law. Oshkosh Northwestern Co. v. Oshkosh Library Board, 125 Wis. 2d 480, 485, 373 N.W.2d 459, 462 (Ct. App. 1985).

The trial court concluded that permitting the amendment to the complaint would prejudice the Fenendaels. However, the trial court did not specify in what respects such prejudice existed. [8] Upon

appeal, the Fenendaels opine that the granting of the motion would have prompted a need to present evidence establishing the "selfish motivation of the Hancoxes and Lillian Zobel's personal motives in going ahead with the transaction before telling the Hancoxes." But such testimony would have no bearing on the legal question of the capacity of a conservatee to make a gift without conservator or conservatorship court approval. The same holds true for the Fenendaels' claim that "the testimony of the judge in the conservatorship proceedings might have been presented." [9]

The amendment to the pleadings would simply have placed before the trial court the underlying legal question presented on this appeal as to whether a conservatee may make a gift of her property without approval of the conservator or her conservatorship

court. No prejudice is shown (and we can fathom none) by the granting of the amendment. The existence of the conservatorship was acknowledged by all parties. Its presence raised a legitimate legal question which the trial court addressed in its ruling on the motion for judgment notwithstanding the verdict. When the facts pertaining to the conservatorship were repeatedly addressed at trial without timely objection, we are at a loss to perceive any prejudice by granting a motion to amend the pleadings to conform to such evidence. [10]

Statutes governing amendment of pleadings are to be liberally construed to permit the presentation of the entire controversy providing such amendment does not unfairly deprive the opposing party of an opportunity to meet the new issue. Gustavson v. O'Brien, 87 Wis. 2d

193, 204, 274 N.W.2d 627, 633 (1979); Wipfli v. Martin, 34 Wis. 2d 169, 174, 148 N.W.2d 674, 677 (1967). Here, we do not see the requested amendment to the pleadings as unfairly depriving the Fenendaels of the opportunity to meet the relevant factual and legal issues presented by Zobel's status as a conservatee. Indeed, the trial court decision points to no such specific prejudice. Under these circumstances, the interests of justice required the granting of the amendment to the pleadings, despite the lack of actual notice to the Fenendaels. Peterson at 634, 312 N.W.2d at 793.

We now turn to the legal issue presented by the amendment to the complaint: Whether a conservatee requires the approval of either the conservator or the conservatorship court in order to make an effective gift of her

property. [11] We conclude she does.

Section 880.31, Stats., provides for the appointment of a conservator of a person's estate when that person "believes that he or she is unable properly to manage his or her property or income." The purpose of the conservatorship statute was "to eliminate the stigma of incompetency for persons who are forgetful because of age, and yet afford them the protection of the court if they desired it." Estate of Evans, 28 Wis. 2d 97, 100, 135 N.W.2d 832, 834 (1965), quoting Kroncke, A Decade of Probate Law, 1961 Wis. L. Rev. 82, 118. The process is voluntary, and the personal appointment of a conservator is not evidence of the competency or incompetency of the person whose estate is under the conservatorship. Sec. 880.31(6). A conservator has all of the powers and duties of a guardian of the

property of an incompetent person. Sec. 880.31(3). Section 880.31, however, does not address the power or capacity of a conservatee to dispose of his or her property.

Evans determined that a conservator had the authority to create a joint tenancy in certain of the conservatorship property when the transfer was sought by the conservatee and when approved by the conservatorship court. The Hancoxes argue that certain supreme court language in Evans always requires approval of the conservator or the conservatorship court before a conservatee can effectively act. "[I]n a conservatorship, where there is no adjudication that the applicant is incompetent, It makes sense to allow the conservatee the freedom to direct a gift of his property where both the conservator and the court, as here, entered no objection." Evans at 101, 135

N.W.2d at 834 (emphasis added). However, the facts in Evans are quite different from those here. In Evans, the conservator was directed to transfer the conservatee's property pursuant to the conservatee's petition and the conservatorship court's order. Here, the conservatee did not seek the prior approval of either the conservator or the conservatorship court. In fact, she expressly sought to circumvent both. In our certification to the Wisconsin Supreme Court we asked whether the intent of the Evans language was to require conservator or conservatorship court approval in all instances.

Although the appointment of a conservator is not evidence of the incompetency of the conservatee, and although a conservatee is not considered completely incapable of looking after his or her own property (Evans at 100), the

purpose of a conservatorship is to afford the protections akin to those provided by a guardianship but without the stigma of incompetency. See Evans at 100, 135 N.W.2d at 834. If a conservatee does not require the input and approval of the conservator or the conservatorship court in matters relating to the disposition of his or her property, a conservatorship serves no meaningful purpose.

If a conservatee wishes to rid himself or herself of the restrictions of a conservatorship, the statute supplies an avenue for relief.

> 880.31(4) Any person whose estate is under conservatorship may apply to the court at any time for termination thereof. Upon such application, the court shall fix a time and place for hearing and direct that 10 days' notice by mail be given to the person's guardian, if any, the conservator and the presumptive heirs of the applicant. Upon such hearing, the court shall, unless it is clearly shown that the applicant is incompetent,

> remove the conservator and order the property restored to the applicant, or if the applicant so desires and the nominee is suitable, the court may appoint a successor conservator.

We acknowledge that invalidating Zobel's gift is a harsh result under the facts of this case where she has been found to be competent at the time of the gift. However, for us to hold that a conservatee may act at his or her whim without conservator or conservatorship court approval would emasculate the statute and render it meaningless. Such interpretations are to be avoided. See Johnson v. State, 76 Wis. 2d 672, 676, 251 N.W.2d 834, 836 (1977). [12]

We therefore reverse and remand this matter to the trial court with directions to grant the Hancoxes' motion to amend the complaint to conform to the evidence and to enter judgment upon the second amended complaint in favor of the

Hancoxes.

By the Court. -- Judgment reversed and cause remanded. [13]

Recommended for publication in the official reports.

APPENDIX

[1] It was only after these events that the Hancoxes were appointed Zobel's guardians.

[2] The amended complaint also challenged Zobel's competency to make a September 1981 amendment to the original land contract. This amendment predated the conservatorship. The jury found Zobel to be competent at the time she signed this amendment. This finding is not challenged upon this appeal.

The amended complaint also raised a claim of undue influence. This, however, was withdrawn at the close of the Hancoxes' case.

The parties agree that the jury issue of Zobel's competency goes to the question of her mental state and does not address the question of her "capacity" to make a gift while subject to a conservatorship.

[3] Technically, this was not a motion to amend to conform to the evidence under sec. 802.09(2), Stats., since the Hancoxes based their motion upon sec. 802.09(1) and (4). However, no prejudice is demonstrated by this failure to refer to the correct subsection since the Hancoxes' attorney indicated that his motion was to amend the pleadings to include the evidentiary references to the conservatorship. In addition, the reference to a "defense" was technically inaccurate since the Hancoxes' pleading was a complaint.

[4] This ruling was made in response to the Hancoxes' motion for judgment

notwithstanding the verdict. Thus, the trial court, despite denying the motion to amend the pleadings, nevertheless reached the legal issue of whether a conservatee could make an effective gift under these circumstances. However, upon appeal, neither party argues that the trial court's judgment notwithstanding the verdict ruling moots the issue concerning the amendment of the pleadings. Nor does either party address the interaction between the two procedural statutes. We choose therefore to address this case on the issue raised and briefed by the parties -- the propriety of the trial court's denial of the motion to amend the pleadings.

[5] Gustavson v. O'Brien, 87 Wis. 2d 193, 274 N.W.2d 627 (1979); Figgs v. City of Milwaukee, 121 Wis. 2d 44, 357 N.W.2d 548 (1984); Fond du Lac Skyport, Inc. v. Moraine Airways, Inc., 67 Wis. 2d 109, 226 N.W.2d 428 (1975); Poehling v. La Crosse Plumbing Supply Co., 24 Wis. 2d 239, 128 N.W.2d 419 (1964); Metropolitan Sewerage District v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co., 69 Wis. 2d 387, 230 N.W.2d 651 (1975).

[6] Express consent may be given by stipulation, or may be incorporated in a pretrial order and rarely raises any serious fact question. State v. Peterson, 104 Wis. 2d 616, 630 n. 17, 312 N.W.2d 784, 791 (1981). See also 6 C. Wright and A. Miller, Federal Practice and Procedure - Civil § 1493, at 461-62 (1971).

[7] Peterson applied the prejudice determination in a situation where the court had acted sua sponte to amend the

complaint to conform to the evidence. Id. at 634, 312 N.W.2d at 793. We see no reason to fashion a different rule in a case such as this where as party has moved to amend a complaint to conform to the evidence. Were we to limit Peterson to only those cases where the court has acted sua sponte, a party who does not move to amend a complaint would receive the benefit of a prejudice determination, whereas a party who place the issue before the court would be denied this determination. This would result in an uneven and unreasonable application of the statute. Such an application is to be avoided. See State Central Credit Union v. Bigus, 101 Wis. 2d 237, 242, 304 N.W.2d 148, 150-51 (Ct. App. 1981). Moreover, when the supreme court fashioned the balancing test in Peterson, it was interpreting sec. 802.09(2), Stats., which contemplates a motion made by a party -- not the court.

[8] The trial court's finding of "prejudice" to the Fenendaels is actually more akin to a finding of laches against the Hancoxes. While a consideration of laches is certainly appropriate in this "balancing of interest proceeding," laches does not necessarily equate with prejudice.

[9] This gratuitously assumes that such testimony is admissible.

[10] The cases relied upon by the Fenendaels are inapposite. Figgs v. City of Milwaukee, 121 Wis. 2d 44, 357 N.W.2d 548 (1984), and its language relating to certain "tactics" on the part of the city attorney smack more of estoppel than prejudice. Moreover, the language is

dicta to the rule of the case which holds that the notice of claim given by the plaintiff was sufficient. It was upon this latter issue that he supreme court reversed the court of appeals -- not any finding or conclusion relating to the conduct of the city attorney.

Fond du Lac Skyport, Inc. v. Moraine Airways, Inc., 67 Wis. 2d 109, 226 N.W.2d 428 (1975), also does not apply since the issue raised by the defendant upon appeal was not raised in his responsive pleadings.

Poehling v. La Crosse Plumbing Supply Co., 24 Wis. 2d 239, 128 N.W.2d 419 (1964), was a summary judgment case in which the trial court rejected a proposed amended answer. Thus, Poehling is only a pleading case and decided only on the pleadings in which the defendant claimed a right to try its defenses seriatim; first by demurrer, then by a plea in abatement, and finally by an answer on the merits. Poehling is not an amendment of pleadings to conform to the evidence case.

The same is true for Trispel v. Haefer, 89 Wis. 2d 725, 279 N.W.2d 242 (1979), where the issue was whether a party should be permitted to amend its pleading for a third time after a failure with a pretrial order, despite a specific warning of a potential dismissal motion prompted by the party's questionable allegations in its original and amended complaints.

Metropolitan Sewerage District v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co., 69 Wis. 2d 387, 230 N.W.2d

651 (1975), and Drehmel v. Radant, 75 Wis. 2d 223, 249 N.W.2d 274 (1977), are cases where the trial court found specific prejudice to the party against whom the motion was made and where wholly unrelated and new issues were injected into a proceeding. Metropolitan Sewerage District also dealt with a responsive pleading.

[11] We certified this issue to the Wisconsin Supreme Court on August 14, 1985. Certification was denied on October 8, 1985.

[12] The Fenendaels note that under a limited guardianship, a ward may be allowed to hold or convey property and to enter into contracts. See sec. 880.33(3), Stats. They argue that it would be anomalous for the law to accord some respect for the unsupervised legal actions of an incompetent, but give none to a conservatee who is presumed competent. We acknowledge the anomaly but point out that this is an inconsistency more properly corrected by legislative, rather than judicial, action.

[13] We are aware that Peterson, having concluded that no prejudice inured to the defendant by virtue of the trial court amendment to the complaint, nonetheless remanded the case "to offer the parties an opportunity to submit additional evidence to ensure that the parties have a full opportunity to be heard on the issues litigated." Id. at 640, 312 N.W.2d at 795. Here, however, the Fenendaels have proffered to us the suggested evidence which they claim would have been offered in response to the

unpleaded issue. We have previously determined herein that such evidence is not relevant to the legal question presented by the requested amendment. In addition, we have attempted to discern other possible evidentiary material not suggested by the Fenendaels that could conceivably be relevant to this issue. We have discerned none.

Finally, this case was tried to a jury whereas Peterson was a trial to the court. Remand here for further evidentiary proceedings is impossible since the jury has been discharged.

IN COURT OF APPEALS OF WISCONSIN
DISTRICT II

LILLIAN ZOBEL, by Herbert Z. Hancox and Helen W. Hancox, her guardians,

Plaintiff-Appellant,

v.

CERTIFICATION of August 14, 1985
No. 84-1539

LEE FENENDAEL and GLORIA FENENDAEL, his wife,

Defendants-Respondents.

Before Scott, C.J., Brown, P.J., and Nettesheim, J.

Pursuant to Rule 809.61, Stats., this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUE

May a conservatee make a gift of his or her property without the approval of the conservator or the court which ordered the appointment of the conservator?

FACTS

In November, 1981, Lillian Zobel petitioned the circuit court for the appointment of a conservator of her estate. The court appointed the appellants, Herbert and Helen Hancox as conservators of Zobel's estate. Prior to petitioning the court for the appointment of conservators, Zobel had sold her house on a land contract to the respondent, Gloria and Lee Fenendael. After the appointment of the Hancoxes, Zobel decided that she wanted to forgive the balance of the land contract and gift her house to Gloria Fenendael. In March 1982, Zobel executed a deed in satisfaction of the land contract. Zobel did not inform the Hancoxes or he court of the pending transaction nor seek their approval prior to the execution of the deed.

The conservators, in an action to declare the deed void, claimed that Zobel, as a conservatee, lacked the capacity to make the gift without the approval of the conservators and/or the court. The trial court held that such approval was not necessary.

DISCUSSION

Section 880.31, Stats., provides for the appointment of a conservator of a person's estate when that person "believes that he or she is unable properly to manage his or her property or income." The purpose of the conservatorship statute was "to eliminate the stigma of incompetency for persons who are forgetful because of age, and yet afford them the protection of the court if they desired it." Estate of Evans, 28 Wis. 2d 97, 100, 135 N.W.2d 832, 834 (1965), quoting Kroncke, A Decade of Probate Law, 1961 Wis. L. Rev. 82, 118.

The process is voluntary, and the personal appointment of a conservator is not evidence of the competency or incompetency of the person whose estate is under the conservatorship. Sec. 880.31(6). A conservator has all of the powers and duties of a guardian of the property of an incompetent person. Sec. 880.31(3). Section 880.31 does not address the power or capacity of a conservatee to dispose of his or her property.

Here, the conservators rely on Evans to support their contention that a gift by a conservatee must have the approval of the conservators and the court. The question addressed in Evans, however, was "whether the trial court erred in authorizing the conservator to place the treasury notes owned by [the conservatee] in joint tenancy with others." Evans at 99, 135 N.W.2d at 833. The issue in

Evans, therefore, concerned the authority of the conservator to enter into a transaction and did not involve the authority of the conservatee to enter into transactions of dispose of property. Some language in Evans, however, suggests that the approval of the conservator and the court is necessary:

> Thus, a conservatee is not considered completely incapable of looking after his own property. A ward under guardianship is either a minor, incompetent, or a spendthrift. He is incapable of looking after his own property and it fits the statutory scheme for control of guardianships that the ward should not be able to control what should be done with his property. But in a conservatorship, where there is no adjudication that the applicant is incompetent, it makes sense to allow the conservatee freedom to direct a gift of his property where both the conservator and the court, as here, entered no objection.

Evans at 100-01, 135 N.W.2d at 834

(footnote omitted; emphasis added). Given that the issue here was not directly before the court in Evans, we are uncertain whether Evans requires the approval of the conservator or the court before the conservatee makes a gift.

Nevertheless, the argument of the conservators is persuasive. As they point out, a conservatee is under the protection of the court because he or she is not able to properly manage his or her property. If the approval of the conservator or the court is not necessary for the conservatee to make a gift of his or her property, then what purpose does the conservatorship serve? Is it a flexible relationship in which the conservatee may choose when he or she desires the protection of the conservatorship? If so, could not the purpose of the conservatorship be undermined and the relationship rendered largely meaningless?

On the other hand, the facts of this particular case present an equally convincing argument for allowing a conservatee to gift property as he or she desires without the approval of the conservator or the court. The appointment of a conservator is not evidence of a person's competence or incompetence. Sec. 880.31(6), Stats. In this action to declare the deed void, the issue of Zobel's competency was litigated and the jury determined that she was competent at the time she made the gift. In executing the deed, Zobel had the assistance of an attorney who testified that he was satisfied that Zobel knew what she was doing when she executed the deed. There is a strong evidentiary record of Zobel's mental competency to gift her house. Her reluctance to inform her conservators was because she anticipated their

disapproval. If this court accepts the argument of the conservators, we would undo the clear intent of Zobel as found by the jury and supported by the evidence. We are reluctant to do so.

We also note that under a limited guardianship, a ward may be allowed to hold or convey property and to enter into contracts. See sec. 880.33(3), Stats. It would appear anomolous for the law to accord some respect for the unsupervised legal actions of an incompetent under this statute, but give none to a conservatee who is presumed competent.

In conclusion, this court is uncertain a to the authority of a conservatee to dispose of his or her property. The statute provides little guidance and the case law is not particularly helpful. The supreme court should make the policy decision of whether the intent of the conservatee

ought to be the primary consideration, or whether the apparent Evans requirement that the conservator or the court approve of a gift ought to govern. We request, therefore, that the supreme court accept jurisdiction in this case.

STATE OF WISCONSIN CIRCUIT COURT
FOND DU LAC COUNTY

LILLIAN ZOBEL, by Herbert Z. Hancox and Helen W. Hancox, her Guardians,

Plaintiffs,

vs.

LEE FENENDAEL and GLORIA FENENDAEL, his wife,

Defendants and Third-Party Plaintiffs,

vs.

HERBERT Z. HANCOX and HELEN W. HANCOX, individually,

Third-Party Defendants.

DECISION ON MOTIONS AFTER VERDICT of May 23, 1984

Case No. 82-CV-673

The above-entitled action was commenced in late September, 1982, when the initial summons and complaint were filed. Plaintiffs sought judgment declaring certain transactions entered into by Lillian Zobel on September 24,

1981 and March 8th (or 9th), 1982, to be null and void and for foreclosure of a land contract involving Zobel and the Fenendaels. Defendants answered denying all such allegations. Plaintiffs then filed an amended complaint in November of 1982 alleging Lillian Zobel was either incompetent or was unduly influenced at the time of the two transactions mentioned above. The case came on for trial before a jury on March 21, 1984, and lasted three days. With the exception of Lillian Zobel all parties were present throughout this trial. The jury by its verdict found that Lillian Zobel was competent at the times she entered the transactions of September 24, 1981 and March 9, 1982.

Plaintiff and defendants have filed motions after verdict. The plaintiffs motions are as follows:

1. To allow the plaintiffs to file the attached Amended Complaint pursuant to Sec. 802.09(1) and (2), Wis. Stats.

2. For a directed verdict in favor of the plaintiffs pursuant to Sec. 805.14(5)(d), Wis. Stats.

3. For judgment notwithstanding the erdict pursuant to Sec. 805.14(5)(b), Wis. Stats.

4. To change the answer to Question 2 to "No" pursuant to Sec. 805.14(5)(b), Wis. Stats.

5. In the absence of granting plaintiffs' Motions as aforementioned, plaintiffs hereby move pursuant to Se. 805.15, Wis. Stats., to set aside the verdict and for a new trial on the following grounds:

a. In the interest of justice.

b. Because of errors in the trial.

In addition to that stated above, the grounds for the above Motions are set forth in the Memorandum attached hereto and made a part hereof, and the Trial Memorandum filed by these plaintiffs. Defendants motions are as follows:

1. Judgment based on the special verdict dismissing the amended complaint.

2. Satisfying as paid in full all amounts due on the contract in question.

3. Declaring Gloria Fenendael to hold sole title to the real estate in question

4. Awarding defendants their taxable costs and disbursements. A hearing on these motions was held on May 7, 1984 and oral arguments presented. Both sides have filed briefs in connection therewith.

The background of this case shows that in December of 1979, Lillian Zobel sold her home to Lee and Gloria Fenendael

by means of a land contract. A little short of two years later (September 24, 1981) Zobel amended the land contract so as to affect its termination date. On December 18, 1981, Herbert Z. Hancox and Helen W. Hancox were appointed conservators of Lillian Zobel by the circuit court of Fond du Lac County. On March 9, 1982, Lillian Zobel signed a deed transferring full title to this real estate to Gloria Fenendael and cancelling any further indebtedness owing by Fenendaels. On July 20, 1982, the Hancoxs [sic] were appointed guardians of Lillian Zobel.

As stated in the first paragraph of this decision the initial complaint filed by plaintiffs alleged Zobel was not competent to enter into the transactions of September 24, 1981, and March 9, 1982. Their first amended complaint added a claim of undue influence to that

of incompetency. This undue influence allegation was later dropped by plaintiffs. Defendants have denied all such allegation in their responsive pleadings.

Plaintiffs' first motion after verdict seeks an amendment of the pleadings to permit them to charge the transfer or gift of March 9, 1982, by Zobel to Gloria Fenendael was "legally insufficient" because it was made during the time Zobel was under a conservatorship neither the conservators (plaintiffs herein) nor the court approved of such transaction. This raises a legal issue which was not found in any of plaintiffs pleadings when the trial commenced. Plaintiffs maintain that under the provisions of Sections 802.09(1) and (2), of the Wisconsin Statues, they are entitled to have their pleadings amended.

Defendants object to such motions and base their claim such motions should be denied on the provisions of Sections 802.06(2) and (4) of the Statutes. It is their position the plaintiffs by failing to plead this legal issue have waived their right to have it brought into the case at this stage of the proceedings by means of a motion after verdict.

Sections 802.09(1) and (2) of the Wisconsin Statutes read as follows:

(1) "Amendments. A party may amend the party's pleading one as a matter of course at any time within 6 months after the summons and complaint are filed or within the time set in a scheduling order under s. 802.10. Otherwise a party may amend the pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given at any stage of the action when justice so requires. A party shall plead in response to an amended pleading within 20 days after service of the amended pleading unless (a) the court otherwise orders or (b) no responsive pleading is required or permitted under s. 802.01(1)"

(2) "Amendments To Conform To The Evidence. If issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice such party in maintaining the action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence."

The pertinent Sections of the Statute relied on by defendants are as follows:

Sections 802.06(2) and (4) state:

(2) "Every defense, in law or fact, except the defense of improper venue, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim shall be asserted in the responsive pleading thereto if one is required, except that the following

defenses may at the option of the pleader be made by motion.... (Emphasis supplied)."

(4) "The defenses specifically listed in sub. (2), whether made in a pleading or by motion, . . . shall be heard and determined before trial on motion of any party, unless the judge to whom the case has been assigned orders that the hearing and determination thereof be deferred that the hearing and determination thereof be deferred until the trial. (Emphasis supplied). (See also section 802.06(8)."

The first mention by plaintiffs of the issue of the legality of the transfer of March 9, 1982, appeared in a "memorandum" filed by plaintiffs counsel with the court less than one week before the jury trial started. This document was dated March 16, 1984. It stated:

"1. The court should rule as a matter of law that the gift made by Lillian Zobel on March 8, 1982, was void inasmuch as it was not approved by either the conservator or the court."

At the close of the plaintiffs' case, their counsel asked for a ruling that the

transfer of March 9, 1982, (sometimes referred to as March 8, 1982, but they are one and the same transaction) be declared void as a matter of law based on the holding of Estate of Evans, 28 Wis. 2d 97. At the close of all the testimony and before the instructions and verdict conference, plaintiffs made motions to amend the pleadings to conform to the proof and for judgment for plaintiff because the conservators and the court had not approved the transaction of March 9, 1982. All such motions were resisted by defendants. Rulings were deferred until the jury verdicts came in.

It is uncontroverted the plaintiffs never raised their legal issue before trial in their pleadings or by motion. Their first such motions came at the close of their case in chief. Section 802.09(1) quoted above and relied on by plaintiffs states:

> (1) "Amendments. A party may amend the party's pleadings once as a matter of course at any time within 6 months after the summons and complaint are filed or within the time set in a scheduling order under s. 802.10. Otherwise a party may amend the pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given at any stage of the action when justice so requires."

Section 802.09(2) relating to conformity to the proofs places the granting of such amendments in the discretion of the court.

On the other hand we have the wording of Section 802.06(2) quoted supra, stating that with certain exceptions not pertinent in our case,

> "Every defense, in law or fact . . . shall be asserted in the responsive pleading. . . ."

Section 802.06(4) provides that such defenses,

> ". . . .shall be heard and determined before trial on motion of any party. . . ."

While it is true that the rules of pleading and practice are usually liberally construed, that does not mean that all regard for the rules laid down in the Statutes can be thrown to the winds. The liberality prescribed in Section 802.09 does not render meaningless the proscriptions found in Section 802.06. The legal issue as to the existence of the conservatorship and its effect as the transfer of March 9, 1982 was never formally raised until the close of the plaintiffs case at trial. Such an issue must have been considered by plaintiffs prior to trial - their trial memorandum reflects that. Plaintiffs could have brought this legal issue to the fore by bringing a motion prior to trial to insert it into their pleadings. As evidenced by the events at trial and subsequent there to this issue is of vital importance to plaintiffs

whole case. The verdict should it stand, makes this issue the very linchpin of plaintiffs case and seemingly their only hope of prevailing in the litigation. Defendants prepared for trial under the expectation they would have to refute the two contentions put forward in plaintiffs pleading: incompetency and/or undue influence. Defendants claim severe prejudice when this legal issue was thrust upon them during the course of trial. It is my opinion they were prejudiced. The facts of the conservatorship ad the date of the transfer of March 9, 1982, were well known to plaintiffs. If they intended to raise the legal issue of the legal effectiveness of this transaction in light of the surrounding circumstances, they should have done so in their pleadings and it should have taken place before trial so defendants could be

apprised of such an issue and given the opportunity to meet it with a defense of their own. As stated previously, amendments to pleadings should be liberally construed to permit amendments providing the amendment does not unfairly deprive the opposing party of timely opportunity to meet the issue created by the amendment. Tri-State Home Improvement Co., Inc., vs. Moraine Airways, Inc., 67 Wis 2d 109. It is my opinion plaintiffs' attempt to interject this legal issue into the case without having plead it in conformity with the Statutes was prejudicial to defendnats [sic] and prevented them from confronting such issue in a timely fashion.

Because of the foregoing, plaintiffs motion to amend their pleadings is denied.

Plaintiffs next motion is for judgment Notwithstanding the Verdict and

a Directed Verdict. This is based on the claim that under the holding of Estate of Evans, supra, plaintiffs are entitled to judgment as a matter of law in their favor. In effect plaintiffs claim that any action taken by the conservator without first securing approval of the conservator and the court having jurisdiction in the matter is a nullity and of no legal consequence. I do not interpret the Evans case in such a manner. As the author of the court's opinion in Evans states at the outset of the decision:

> "One question is presented on this appeal. It is whether the trial court erred in authorizing the conservator (a bank) to place the treasury notes owned by Evans (the conservatee) in joint tenancy with other."

The court held this was permissable [sic]. Admittedly there is language in the opinion which might be interpreted to hold that in our case Zobel could not

make the March 9, 1982 transfer without the approval of plaintiffs and the court. However, I consider this to be more in the nature of dictum and not the principal holding of this case. On March 9, 1982, neither the conservator nor the court challenged or objected to Zobel's transfer to Gloria Fenendael. On that date there was nothing to indicate Zobel was not competent and knew what she was doing. With the exception of Dr. Treffert's testimony based on his examination of Zobel about 2 1/2 months later, all other evidence indicated she was competent, knew what she was doing and intended to deed the property to Fenendael and cancel the balance owing on the land contract. In my opinion the ruling in the Evans case does not mandate a finding that the transaction by Zobel of March 9, 1982, is null and void and of no legal effect.

Plaintiffs also move for a new trial in the interest of justice and errors during the trial in the admission of hearsay testimony. It is axiomatic that a court has the power to order a new trial in the interest of justice. Stewart vs. Wolf, 85 Wis. 2d 461, Bartell v. Luedtke, 52 Wis. 2d 372. I do not agree that the verdict of this jury is not amply supported by the evidence. Lillian Zobel over the years exhibited a consistent course of conduct showing her regard and concern for the Fenendaels and especially Gloria Fenendael. There was a large amount of testimony as to Zobel's mental alertness, her ability to understand what she was doing and of expressing her wishes that things be done in just such fashion. The people having almost daily contact with her testified to her mental condition and stated that in their opinion she was manifestly

competent, alert, aware of what she was doing and verbalizing her desires in such respect. Her personal physician testified in the same vein - Lillian Zobel knew what she was doing and was perfectly competent at all relevant times in question. The only substantive testimony to the contrary was offered by Dr. Treffert. As stated earlier his opinion was based on an examination of Zobel some 2 1/2 months after March 9, 1982. The jury heard his testimony as well as that of all the other witnesses on this issue, and they considered it all in arriving at their verdict. It was for they jury to determine the weight, credibility and persuasiveness of such evidence. I do no consider their verdict to be against the great weight and preponderance of the evidence, testimony and exhibits. On the contrary it is my

opinion the verdict is amply supported by the evidence and should not be set aside.

As for errors during the trial in admissions of alleged hearsay testimony, plaintiffs feel to specify what such errors were and what they involved. Such a generalized vague objection cannot be used as a basis for upsetting the jury's verdict.

Based on the foregoing the plaintiffs' motions after verdict are denied. Judgment on the jury's verdict is to be entered. Record title to the real estate in question is to decreed to be in Gloria Fenendael. Payments due and owing on the land contract, up to

March 9, 1982, if any are to be paid to the guardians of Lillian Zobel.

DATED: May 23, 1984

BY THE COURT:

/s/ John P. McGalloway, Jr.
John P. McGalloway, Jr.
Circuit Judge

Office of the Clerk
SUPREME COURT
STATE OF WISCONSIN

Madison, April 8, 1986

To: Hon. John P. McGalloway, Jr.
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The Court today announced an order in your case as follows:

No. 84-1539 Zobel v. Fenendael

The court having considered defendants-respondents-petitioners Lee and Gloria Fenendael's petition for review of an adverse decision of the court of appeals, district II, dated November 20, 1985,

IT IS ORDERED the petition for review is denied, with $50 costs to plaintiff-appellant Lillian Zobel.

Marilyn Graves
Clerk of Supreme Court

STATE OF WISCONSIN
SUPREME COURT
and
COURT OF APPEALS
DISTRICT II

LILLIAN ZOBEL, by
Herbert Z. Hancox and
Helen W. Hancox, her
guardians,

Plaintiff-Appellee,

v.

Appeal No. 84-1539
Filed July 3, 1986

LEE FENENDAEL and
GLORIA FENENDAEL, his
wife,

Defendants-Appellants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Lee Fenendael and Gloria Fenendael, the appellants in the above-captioned action, hereby appeal to the Supreme Court of the United States from the whole of the final order of the Wisconsin Court of Appeals, District II, rendered November 20, 1985, reversing a judgment of the Fond du Lac

County Circuit Court in case number 82-CV-673, which was entered June 21, 1984. The above-captioned appellants petitioned the Wisconsin Supreme Court for review of the November 20, 1985 decision of the Wisconsin Court of Appeals, District II, and the Wisconsin Supreme Court denied review in its order of April 8, 1986.

The United States Supreme Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1257(2).

Dated at Milwaukee, Wisconsin, this 2nd day of July, 1986.

Respectfully submitted,

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Kenan J. Kersten
Ann L. Muchin
Attorneys for the Appellants

_____
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Portion of petition to Wisconsin Supreme Court to review. Referring to constitutional rights.

II. HOLDING THAT A CONSERVATEE IS LEGALLY PRECLUDED FROM GIFTING HER PROPERTY DEPRIVES A CONSERVATEE OF DUE PROCESS OF LAW FOR GIFTS MADE PRIOR TO THE EFFECTIVE DATE OF THAT HOLDING.

At the time of the gift (until the date of the court of appeals opinion) there was no existing Wisconsin law restricting the powers of a conservatee to dispose of property. (See Certification at 6). Without authority to the contrary, it is unconstitutional to deprive Lillian Zobel, as a matter of law, of the right to dispose of her own property in March of 1982 by an appellate decision rendered November 20, 1985. Denying review would result in a new pronouncement of law voiding an action which was valid at the time it occurred. Although the conservatorship statutes provide a mechanism whereby a transaction is voidable (dependent upon

the factual circumstance of competency), adherence to the court of appeals decision voids the transaction as a matter of law.

The only existing law pertaining to a conservatee's powers deals with factual competency, not legal competency. Section 880.31(6) expressly provides that a conservatorship "shall not be evidence of the competency or incompetency of the [conservatee]." Section 880.215 provides that a ward subject to a limited guardianship has the power to enter a valid contract and it will not be held void "unless the determination is made by the court in its finding under s. 880.33(3) that the ward is incapable of exercising the power to make contracts." It is clearly unconstitutional to permit an incompetent ward to convey and hold property in certain situations, yet preclude a

conservatee who has not had the benefit of a hearing regarding competency from gifting her own property.

This is particularly ironic in the case at bar where this legal issue was never raised until the close of the plaintiffs' case in chief and there was a three day trial where the mental incompetency was the sole issue at trial. A jury found that the conservatee was mentally competent and intended to gift her property to the Fenendaels and the trial judge entered judgment on that verdict. Considering the foregoing, the supreme court should not condone precedent which precludes, as a matter of law, a conservatee from conveying property when it has already been litigated and decided that she was mentally competent when she did so. As the court of appeals notes, it is not even remanding the matter to the trial

court for further findings or an additional evidentiary hearing where testimony from the conservatorship court can be presented. Opinion, n.13 at 21. It merely voids the transaction, reversing the judgment entered on the jury's verdict.

The court of appeals voids this finding of mental competency and creates a legal preclusion which did not exist at the time of the transaction. As the Wisconsin Supreme Court has recognized:

> There is a high place, in contemplation of the fundamental principles of civil life, which the right of individual liberty to dispose of one's property by contract or by will, - holds. It is not the business of courts to undo what an old person may have done with h[er] property because of judicial notions of propriety or moral obligations, in a case of this sort, where the wishes of relatives, however deserving. Did the [wo]man do freely what [s]he wanted to and was competent to decide upon? Those are the sole questions.

In re Estate of Bauer, 264 Wis. 556, 561, 59 N.W.2d 481 (1956)(quoting Boardman v. Lorentzen, 155 Wis. 566, 579, 145 N.W. 750 (1915)(emphasis supplied)). The court of appeals decision, creates law which is incongruous with the existing statutory law pertaining to conservatorships and guardianships and voids the clearly intended and competent act that Lillian Zobel took in March of 1982. This unwarranted deprivation of Lillian Zobel's constitutional rights, on an ex post facto basis, in and of itself warrants this court's review pursuant to Rule 809.62(1)(a).

III. WISCONSIN STATUTES SECTION 809.62(1)(d) APPLIES.

Although the issue of law determined by the supreme court in Estate of Evans related to the authority of a conservator, the court did state that "a conservatee is not considered completely

incapable of looking after his own property" (28 Wis. 2d at 100) and that it should not be necessary for a competent conservatee to terminate the conservatorship in order to consummate competently intended transactions. 28 Wis. 2d at 101. To the extent the court in Evans intended to keep the concept of conservatorship sufficiently flexible to permit the conservatee to act outside the conservatorship under certain circumstances, the court of appeals decision in this case conflicts with Evans. Since there is no controlling supreme court decision or Wisconsin statute requiring the court of appeals holding herein, the supreme court should review and decide this case to resolve that apparent conflict. If, as the court indicated in Evans, the concept of conservatorship is to be sufficiently flexible to recognize as valid acts of

conservatees in certain cases, this, under the undisputed record, is such a case. Rather than repeating the extensive evidentiary record reviewed in the statement of facts herein upon which Lillian Zobel was found at trial to have been competent at the time in question, it should suffice to cite the court of appeals' statement that "there is a strong evidentiary record of Zobel's mental competency to gift her house" (Certification at 5) and that "invalidating Zobel's gift is a harsh result under the facts of this case where she has been found to have been competent at the time of the gift" (Opinion at 16)(emphasis supplied).

CONSTITUTIONAL AND STAUTORY PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state capitols wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1 (emphasis supplied).

Wisconsin Constitution, Article I

Declaration of Rights

> Equality; inherent rights. Section 1. All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to serve these rights,

governments are instituted, deriving their just powers from the consent of the governed.

Wis. Const. art. I, § 1.

Wisconsin's Conservatorship Statute

880.31 Voluntary Proceedings; Conservators

(1) Any adult resident who believes that he or she is unable properly to manage his or her property or income may voluntarily apply to the circuit court of the county of his or her residence for appointment of a conservator of the estate. Upon receipt of the application the court shall fix a time and place for hearing the application and direct to whom and in what manner notice of the hearing shall be given.

(2) At the time of such hearing the applicant shall be personally examined and if the court is satisfied that the applicant desires a conservator and that the fiduciary nominated is suitable, the court may appoint him as such and issue letters of conservatorship to him

upon the filing of a bond in the amount fixed by the court.

(3) A conservator shall have all the powers and duties of a guardian of the property of an incompetent person. The conservator's powers shall cease upon being removed by the court or upon death of the person whose estate is being conserved.

(4) Any person whose estate is under conservatorship may apply to the court at any time for termination thereof. Upon such application, the court shall fix a time and place for hearing and direct that 10 days' notice by mail be given to the person's guardian, if any, the conservator and the presumptive heirs of the applicant. Upon such hearing, the court shall, unless it is clearly shown that the applicant is incompetent, remove the conservator and order the property restored to the applicant, or if the applicant so desires and the nominee is suitable, the court may appoint a successor conservator.

(5) If the court shall upon such hearing

determine that he person whose estate is administered by a conservator may be incapable of handling his estate, the court shall order the conservatorship continued, or if the applicant so desires and the nominee is suitable, the court may appoint a successor conservator.

(6) Appointment of a conservator shall not be evidence of the competency or incompetency of the person whose estate is being administered.

(7) If an application for conservatorship is filed, the fee prescribed in s. 814.66(1)(b) shall be paid at the time of the filing of the inventory or other documents setting forth the value of the estate.

Wis. Stats. § 880.31 (emphasis supplied).